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In the Supreme Court of the United States

OCTOBER TERM, 1966.

No. 746

JAMES L. WERNER,
Petitioner,

vs.

STATE OF OHIO,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the Court of Appeals, Geauga County, Ohio,
Seventh Judicial District of Ohio.

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JAMES L. WERNER,

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PETITION FOR WRIT OF CERTIORARI
To the Court of Appeals, Geauga County, Ohio, Seventh Judicial District of Ohio.

OPINIONS BY COURTS BELOW.

The petitioner, James L. Werner, respectfully prays that a writ of certiorari issue to the Court of Appeals of the Seventh Judicial District to review the decision and judgment of that Court in Case No. 377, entitled State of Ohio vs. James L. Werner. The decision of the Court of Appeals is unrecorded and is appended hereto as, "Appendix A."

The judgment journal entry of the Court of Appeals and an entry of that Court denying rehearing both dated January 18, 1966, are appended hereto and marked, "Appendix B."

The judgment of the Court of Appeals affirmed the judgment of the Court of Common Pleas of Geauga County upon the verdict of a three-judge panel finding the petitioner guilty of eight counts of embezzlement, and dis-

missing seventeen other counts of forgery and uttering and publishing forged documents. A copy of the indictment is appended as "Appendix C." The journal entries of the trial court's ruling on the case and the overruling of the motion for a new trial are appended and included in "Appendix D."

A plea in abatement was filed and heard by the judge of the Geauga County Court of Common Pleas prior to the formation of the three-judge panel and that court's opinion and the entry journalizing it are appended as "Appendix E." Similarly a motion to quash was filed, argued, and overruled by the Geauga County Court of Common Pleas and the court's opinion and its journal entry dated June 3, 1964, are appended hereto as "Appendix F."

After the judgment of the Court of Appeals affirming the decision of Geauga County Common Pleas Court, the petitioner seasonably sought review of the judgment of the Court of Appeals by the Supreme Court of Ohio raising, among other things, questions as to whether the petitioner's right to a fair trial under the Constitution of the United States and the State of Ohio had been violated. The jurisdiction of the Supreme Court of Ohio to review these cases is found in Article IV, Section 2, Constitution of the State of Ohio, and Sections 2505.28 and 2505.29 of the Ohio Revised Code. Under these provisions the petitioner had no appeal as a matter of right to the Ohio Supreme Court, review by that Court being discretionary and based upon the grounds that a debatable constitutional question is involved or that the case is one of public and great general interest.

On June 8, 1966, the Supreme Court of Ohio dismissed the appeal of this petitioner sua sponte on the basis that no substantial constitutional question existed over-

ruling thereby, the motion for leave to appeal. Appended hereto in "Appendix G" are the journal entries in the Supreme Court of the State of Ohio.

Under the law of Ohio, therefore, the judgment of the Court of Appeals for Geauga County, Ohio, Seventh Judicial District of Ohio, becomes the final judgment of the highest court in the State of Ohio in which a decision can be had. *Cuyahoga River Power Company vs. Northern Realty Company*, 244 U. S. 300 (1917).

JURISDICTION OF THIS COURT.

The dates of the judgments of the Seventh District Court of Appeals of Ohio to be reviewed as stated above are January 18, 1966.

An order extending the time for filing this petition for certiorari was granted by this Court until November 5, 1966, and the mandate of the Supreme Court of Ohio was stayed pending the filing and disposition of this petition for writ of certiorari on July 5, 1966.

Jurisdiction of this Court to review the said judgments of the Court of Appeals for Geauga County and to review the constitutional questions raised by the petitioner are conferred upon this Court by the Act of June 25, 1947, c. 646, 62 Stat., 929, Title 28, U. S. C. Section 1257. The portions of that section pertinent to jurisdiction of this review provide as follows:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> (3) By writ of certiorari * * * where any title, right, privilege or immunity is specially set up or claimed under the Constitution of the United States."

QUESTIONS FOR REVIEW.

1. Was petitioner's constitutional right against self incrimination violated when his testimony, books and records, taken pursuant to a deposition in a civil suit, were presented to a grand jury at a later date against his will and without his permission?

2. Was the petitioner denied due process when his attorney was prohibited from inquiring into the extent of the use of the deposition, books and records, attendant thereto before the grand jury and further prohibited from inquiry into testimony elicited before the grand jury of a mentally incompetent witness who had not been examined by the trial court as to competency prior to such testimony?

3. Was the petitioner denied due process in violation of his constitutional rights by the refusal of the trial court to grant his motion to quash the indictment or to compel an election thereunder because of the improper joinder creating a multiplicity and duplicity of counts?

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED.

The constitutional provisions involved are the Fifth Amendment to the Constitution of the United States; the First Section of the Fourteenth Amendment to the Constitution of the United States; the Tenth Section, First Article of the Constitution of Ohio; Sections 2941.04, 2913.01, 2907.34 of the Revised Code of Ohio.

The foregoing constitutional provisions and state statutes are appended hereto as "Appendix H."

STATEMENT OF THE CASE.

The petitioner was convicted of eight counts of embezzlement on October 30, 1964, before the Common Pleas Court of Geauga County in Ohio. He had been charged with twenty-eight counts of embezzlement, forgery and uttering and publishing checks knowing that the endorsement was forged. All of the forgery and uttering and publishing counts were dismissed or the defendant found not guilty thereof.

The petitioner, at the time of trial and prior thereto, was a practicing attorney in Chardon, Ohio, which is the seat of Geauga County. He had been admitted to the Ohio Bar in August of 1950; and, in addition to the practice of law, conducted an agency for the Land Title Guaranty and Trust Company.

In 1959 he incorporated the Geauga Broadcasting Company for the purpose of obtaining a license from the Federal Communications Commission and establishing the first radio station in Chardon, Ohio. The radio station went on the air the latter part of 1962 and continued to broadcast until March, 1964.

Sometime in the early part of the year, 1958, a widow named Frances Frohring came to the petitioner's office to retain legal services in the probate of her husband's estate. The petitioner had formed a partnership for the practice of law under the name of, Werner and Smith, and upon the advice of Judge Robert B. Ford, Mrs. Frohring obtained the name of that firm, along with others. She talked to petitioner's partner, Ced Smith. (R. 215, 216.)

From 1958 until April, 1963, the firm of Werner and Smith represented Mrs. Frohring in the probating of her husband's estate and, subsequently, in the investment of various proceeds received from her inheritance. On April 1, 1963, upon application of Mrs. Frohring's daughter, who

was then by name Jean Sargent, Mrs. Frohring was committed to the Fairhill State Hospital where she remained for two months. The daughter, Jean Sargent, was appointed Mrs. Frohring's guardian despite the fact that they were not close. (R. 121.)

The hospital records, which are defendant's "Exhibit V," indicate that the preliminary diagnosis which was based on Jean Sargent's statements, were that Mrs. Frohring's was a schizo-paranoid. Psychological tests given her at the hospital did not bear this out. One hundred milligrams of thorzaine were prescribed for Mrs. Frohring and she continued to take that dosage each day up and until the time of testifying at the trial.

Page 279 of the Record shows the following:

(Questions by Richard O. Colgrove.)

"Q. Are you under medication today?
A. Yes.
Q. These are what you call the nerve pills?
A. Yes."

Again at page 408 of the Record:

"Q. You told us the last time you testified you were taking two kinds of pills?
A. Yes.
Q. Did you take those pills today?
A. Yes.
Q. You continued to take them every day since the last time you were here?
A. Yes."

On April 1, 1963, the petitioner was advised by a letter demanding papers that the law firm of Falsgraf, Kuntz, Reidy and Shoup, Mr. William Falsgraf of counsel, was representing the guardianship. Petitioner did not know of Mrs. Frohring's commitment. William Falsgraf had assisted in obtaining the confinement of Mrs. Frohring

and his firm had been involved in an adversary proceeding with Mrs. Frohring during the early part of petitioner's representation of her.

Page 105 of the Record:

(Cross-examination of William Falsgraf, Questions by Richard O. Colgrove.)

"Q. And your firm had been connected in representation of W. O. Frohring in the sale of Newberry Industries stock?

A. That is correct.

Q. You were personally involved in that?

A. No.

Q. This was your father?

A. That's right.

Q. In that particular proceeding Mrs. Frances Frohring was represented by Werner & Smith, was she not?

A. Yes.

Q. And the parties were to some extent adversary, were they not?

A. As I understand."

After a series of exchanges between William Falsgraf and petitioner relative to accountings and the surrender of papers on November 23, 1963, the petitioner was sued civilly for an amount in excess of Two Hundred Thousand Dollars ($200,000.00). The suit was filed on behalf of Frances B. Frohring by her guardian and, in the meantime, Mrs. Frohring had been released from Fairhill State Hospital. The guardianship was not removed but was qualified by court order to rule that she was competent in part and incompetent in part and that the guardianship was to be continued. Petitioner's wife, Shirley Werner, Geauga Broadcasting Company, the law firm of Werner & Smith, and Ced L. Smith were made parties defendant in this civil suit.

The deposition of petitioner was taken by plaintiffs in the civil suit on December 17, 1963, and continued and finished on January 2, 1964. At that time there was no indication of anticipated criminal action.

Page 100 of the Record:

(Cross-examination of William Falsgraf, Questions by Richard O. Colgrove.)

"Q. Is it not true we showed you this particular exhibit before you started asking questions on deposition?

A. Yes." (Referring to State's "Exhibit 19.")

Again in reference to State's "Exhibit 19" see page 110 of the Record:

(Cross-examination of William Falsgraf, Questions by Richard O. Colgrove.)

"Q. After Jim Werner was deposed and after he gave you the statement there was a figure determined as the amount of money that had gone into the Geauga Broadcasting Company, was there not?

A. Yes. I believe it appears there.

Q. This was the figure which Jim Werner gave you?

A. That's right.

Q. Based on that figure then you and I and Mr. Miller laboriously pounded out an agreement?

A. That is correct.

Q. And the agreement was one of settlement and, in part, based on the sale of the radio station?

A. That's right.

Q. The figure which we used, which was represented as the money which went into the radio station, was this figure given by Jim Werner on the deposition?

A. That's right."

Defendant's "Exhibit E" shows that Frances B. Frohring was to receive Eighty-Six Thousand Thirty-Four

Dollars and sixty-one cents ($86,034.61) from the sale of radio station WGLD and thereby release all of her rights to stocks and debentures in the company. That particular clause in the exhibit states:

> "Said release will acquit and indemnify said Geauga Broadcasting Company, Shirley Werner and James Werner, from any and all liability and any and all contractual obligations to honor any stock subscription right which said plaintiffs may have."

The State of Ohio had drawn its counts on a theory that James Werner, the petitioner, had bought and sold stock with Mrs. Frohring's money and converted the same to his own use. The figures discussed above were the proceeds of this purchase of stock through a trading account with the brokerage firm in Cleveland, Ohio, named Paine, Webber, Jackson and Curtis. Petitioner defended in testifying that everything he did was done with the knowledge and authority of Mrs. Frohring and that the figure of $86,034.61 represented ownership by Mrs. Frohring in the Geauga Broadcasting Company and debentures. The radio station was sold for One Hundred Fifty Thousand Dollars ($150,000.00).

Page 122 of the Record:

(Cross-examination of William Falsgraf, Questions by Richard O. Colgrove.)

"Q. You do know that the radio station was sold at one time?

A. There was a contract for the sale I know.

Q. You saw the contract?

A. I did.

Q. You approved it?

A. I did."

And again on pages 123 and 124 of the Record referring to defendant's "Exhibit G" which was an agree-

ment to purchase, Mr. Falsgraf was cross-examined by Richard O. Colgrove as follows:

> "Q. I am referring to the agreement in evidence and on file with the escrow agent relative to the first sale, Mrs. Frohring's interests and claims were taken care of before any money went anywhere else from the sale?
>
> A. That is correct.
>
> Q. My question again was that she was the prime beneficiary?
>
> A. Yes, she was, she stood to gain all the money back by the sale of the station, yes."

On April 7, 1964, an indictment was filed by the State of Ohio pursuant to return of a true bill by the Geauga County Grand Jury against the petitioner alleging the said twenty-eight counts. As a result of the extreme publicity given to the arrest of a prominent person, the purchasers of the radio station who had deposited their agreement to purchase for One Hundred Fifty Thousand Dollars ($150,000.00) with the Chardon Savings Bank, withdrew and refused to go forward. See page 505 of the Record and the testimony of petitioner as follows:

> "Q. State whether you were subsequently advised that the sale was off as far as those purchasers were concerned?
>
> A. That is correct. * * *
>
> Q. Is there any reason for that?
>
> A. This criminal case has stopped it and I can't tell you why there are no offers at the present moment but there are none."

Petitioner filed a motion to quash or alternately to require election and/or severance of counts together with a brief in support on April 22, 1964. The court's opinion overruling this motion is appended hereto. Thereafter petitioner filed a plea in abatement on June 15, 1964, and

this too was overruled, the opinion and entry being appended hereto. In both the motion to quash and the plea in abatement the petitioner raised the constitutional question of self incrimination in that the deposition and records of the petitioner were presented to the grand jury against his will and without his permission. In the motion to quash, the question of due process was raised in that duplicity of counts were alleged. In the plea in abatement testimony was taken in an attempt to show that Frances Frohring, who had just been released from a mental hospital and was under a guardianship, was permitted to testify without any examination as to her competency as a witness. The question of the deposition being wrongfully used was also raised. The trial court stated as follows:

> "Despite defendants exhibits and recitals therein, there is no evidence of actual adjudication of the alleged mentally incompetent witness. She did have, and probably still has some mental disability and she is under guardianship, though the latter may well be one of business and experience and convenience rather than mental incompetence. Such a person is not per se an unreliable or unintelligent witness, but the court agrees generally with the procedure suggested in defendant's brief.
>
> "The testimony indicates that a witness saw portions of the deposition during his testimony before the Grand Jury.
>
> "There is no allegation or proof that either the testimony of the allegedly incompetent witness or the testimony of the witness who refreshed his recollection from the deposition was all the testimony.
>
> "A plea in abatement will be denied where the plea does not say and the testimony does not show that the offensive or wrongfully admitted evidence was the sole evidence the Grand Jury had to consider; see *Lindsey v. State,* 69 Ohio St., 215.
>
> "The Court is of the opinion that no evidence

should be received from grand jurors, witnesses, or any other person in the grand jury room, as to what evidence was presented to that forum by the prosecuting attorney or any other person; see 26 *Ohio Jur.* 2d, Section 46, page 290."

The trial court went on to say that in view of the above authority, and even assuming that defendant was compelled to incriminate himself, the plea in abatement would have to be denied in the absence of allegation of proof that such evidence was the only evidence upon which the Grand Jury relied.

As indicated by the opinion, the petitioner was prohibited from and denied the right of further investigation.

The second assignment of error made in the Seventh District Court of Appeals was "that the trial court erred in overruling the defendant's plea in abatement filed on June 15, 1964."

That court in its written opinion held as follows:

"The second assignment of error is also not well taken. We do not find the case of Willie L. Short, Jr., appellant, vs. United States of America, appellee, 342 Fed. 2d, 863, brought to the attention of this court by defendant's supplemental brief, applicable to the case at bar. The Short case involved a person who was taken before a Grand Jury to give testimony before it without, in the view of the United States Court of Appeals, an adequate appraisal of his rights including that to counsel. The deposition whose use is sought to be attacked in the present case, however, was obtained before any criminal prosecution was initiated. No proof appearing to the contrary, we must presume that it was taken in a lawful manner, and in good faith. Discussion of the question of the propriety of using a deposition taken in a civil proceeding as a basis for indictment is limited, but there is authority to the effect that it ought to be allowed. See Reg vs.

Bullard, 12 Cox C. C. 353, 14 Mook, Eng. Rep. 603 (Ev) cited in Commonwealth of Massachusetts v. Morris A. Hadden, 28 L. R. A. 318 at 320, and we agree with this position."

As shown in the appended opinion the Court of Appeals went on to state that unless it were shown that all the evidence was unlawfully procured or that the deposition contained evidence of the commission of the crimes with which he was charged, the conviction should not be reversed even if the deposition was improperly used.

Pursuant to this, and after the ruling of the Court of Appeals, a motion for rehearing was made and more recent authorities than those cited in the opinion given to the court. It was pointed out to the Seventh District Court of Appeals that the petitioner was prohibited from seeking the very information which the court had found to be missing and necessary. Authorities were cited in support of the prevailing rule that the Grand Jury minutes should have been made available but the Seventh District Court of Appeals denied the motion without opinion.

After the plea in abatement was denied in the trial court, trial was held to a panel of three judges on the 23rd, 24th, and 25th day of September, 1964. The hearing was adjourned at the conclusion of the state's case and was not resumed until October 28, 1964. The three-judge panel sustained motions to dismiss as to counts one, two, thirteen, and fourteen; found petitioner guilty on counts three, four, five, six, seven, eight, nine and eleven, and not guilty of the rest. The petitioner was sentenced to the Ohio Penitentiary for one to ten years concurrently on all counts.

The counts pertaining to forgery and uttering and publishing forged instruments were either dismissed or a verdict of not guilty returned thereon and the counts upon

which petitioner was found guilty pertain to embezzlement. Each one of the alleged offenses had been made subject to three counts, to wit: embezzlement, forgery, and uttering and publishing.

It is submitted that the petitioner raised the constitutional issues at each opportunity before and during the trial and during the appeals following the trial. Under the law of Ohio, substantial constitutional rights are not waived by failure of counsel to raise them in the lower courts. *State of Ohio vs. Hensley*, 75 Ohio St. 255 (1906). In this matter, however, the constitutional issues were raised and both the trial court and the Court of Appeals ruled that petitioner's constitutional right had not been violated.

REASONS FOR GRANTING THE WRIT.

QUESTION NO. 1.

The petitioner was compelled to testify as was stated above, under compulsion of subpoena in a civil case. At that time he produced all of his books and records and willingly gave statements which resulted in a determination of an amount which Frances B. Frohring was alleged by petitioner to have invested in his radio station. The final figure was accepted in total by the attorney for Frances Frohring.

It was this deposition and various computations and copies of the books and records of the petitioner which were presented to the grand jury by and through William Falsgraf. The use and extent of use of the testimony of Mrs. Frohring's attorney and of the records of the petitioner, are not known because as will be shown under Question No. 2, petitioner's counsel was not permitted to inquire beyond a cursory questioning of Mr. William Falsgraf, counsel for Frances B. Frohring.

While the trial court took the position as indicated in his opinion, that the grand jury does not exercise a judicial function, this Court has stated as early as 1891 that the privilege given by the Fifth Amendment to the Constitution that no person shall be compelled in any criminal case to be a witness against himself extends to a proceeding before a grand jury. *Counselman v. Hitchcock*, 142 U. S. 1110, 35 L. Ed. 547-586.

This Court has ruled that the Fifth Amendment privilege against self incrimination is protected by the Fourteenth Amendment against abridgment by the states. *Malloy v. Hogan*, 378 U. S. 1, 12 L. Ed. 2d 653, 84 S. Ct. 1489, decided June 15, 1964.

In a companion case decided on the same day, the decision was rendered in *Murphy v. Waterfront Commission of New York Harbor*, 378 U. S. 52, 12 L. Ed. 2d 678, 84 S. Ct. 1594. This Court stated that the availability of the federal privilege against self incrimination to a witness in a State inquiry is to be determined according to the same standard that is applicable in a federal proceeding.

In the *Malloy* case, Justice Brennan made this statement on page 8 of the U. S. citation:

> "Government, state and federal, are thus constitutionally compelled to establish guilt by evidence independently and freely secured, and may not by coercion prove a charge against an accused out of his own mouth. Since the Fourteenth amendment prohibits the states from inducing a person to confess through 'sympathy falsely aroused,' Spano vs. New York, supra, 360 U. S. 323, 3 L. Ed. 2d at 1272, or other like inducement far short of 'compulsion by torture' Haynes v. Washington, supra, it follows a fortiori that it also forbids the states to resort to imprisonment, as here, to compel him to answer questions that might incriminate him. The Fourteenth amend-

ment secures against state invasion the same privilege that the Fifth amendment guarantees against federal infringement—the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty, as held in Twining for such silence."

Having established the protection of the United States Constitution to petitioner, we come back to the question of whether or not this protection was denied or abrogated by the use of his deposition and records before the grand jury. The federal courts have shown an inclination to look closely at grand jury proceedings and the effect of testimony in reference to self incrimination, or presentation of records, before those grand juries. In the case of *Jones vs. United States of America,* 42 Fed. 2d 863 (1964), it was held that the defendant being taken before a grand jury without counsel was being forced to testify against himself. The opinion of the court was interesting in that it was stated that the defendant's appearance, even if he were not to utter any incriminating statements, might in and of itself be "self-incriminating."

In the *United States v. DeGrazo,* 213 Fed. Sup. 232, decided by the United States District Court, Northern District of Illinois, Eastern Division, on January 23, 1965, it was held that mere doubt whether testimony that the defendant gave before the grand jury without warning of his privilege against self incrimination and which contained no incriminating statement, but might have tended to incriminate the defendant, required the quashing of the indictment. The court held this even though satisfied that the government had discovered independent information warranting the defendant's indictment after the testimony was given.

The state courts in some states have followed the

federal trend. In *People of the State of New York v. Laino*, decided in 1961 in the Court of Appeals and reported at 176 N. E. 2d 571, the New York Court held that the defendant's constitutional privilege against self incrimination was violated when he was compelled to testify and produced books and records. The court said that the defendant and his books and records could not be subpoenaed and could not be used as a basis for indictment for tax evasion even though that particular crime was not under investigation when the defendant was called before the grand jury. It was noteworthy also, that defendant was present with counsel and was advised as to immunity. The court stated that the defendant, under his constitutional privilege afforded him not to incriminate himself, should be protected from an indictment based on any incriminating testimony and also from evidence.

See *People ex rel. Tenny vs. Adams*, 292 N. Y. 65, 54 N. E. 2d 10, *People of the State of New York vs. Steuding*, 160 N. E. 2d 468. 38 *ALR* 2d page 290.

QUESTION NO. 2.

The trial court in response to the plea in abatement filed by petitioner, ruled that there was not sufficient evidence shown him to justify a finding of irregularity in grand jury proceedings. As was pointed out above, this plea was directed to the testimony of Frances Frohring whose mental status was in question and the use of petitioner's deposition which included many of his private papers. The trial court then rendered the opinion that no evidence should be received from grand jurors, witnesses or any other person in the grand jury room.

The Court of Appeals for the Seventh District agreed with the trial court and went further to say that unless

there was an affirmative showing that all of the evidence given to the grand jury in reference to petitioner was improper, the plea in abatement was properly denied.

Both courts erred to the prejudice of petitioner's constitutional rights under the Fourteenth Amendment in that petitioner was not permitted to examine and thereby produce, the irregularities of the grand jury proceedings. In *Raymond Dennis vs. United States* decided by this Court on June 20, 1966, and reported at 16 L. Ed. 2d 973 (the only citation available to petitioner in this area) this Court disagreed with both the Seventh District Court of Appeals and the Trial Court of Geauga County.

It is distinctly stated on page 984 of that opinion that, "these developments are entirely consonant with the growing realization that disclosure, rather than suppression, of relevant materials ordinarily promotes the proper administration of criminal justice."

In Ohio a plea in abatement is authorized under Ohio Revised Code Section 2941.55. It reads as follows:

Plea in Abatement

"Plea in abatement may be made when there is a defect in the records shown by facts extrinsic thereto."

Petitioner's plea set out all of the details of the civil suit and is appended hereto and marked "Appendix I."

It is submitted that under the detail of the request made in the plea in abatement a particularized need is shown to qualify this case with that of *Pittsburg Plate Glass Company vs. United States*, 360 U. S. 395, 400; 3 L. Ed. 2d 1323, 1327, 79 S. Ct. 1237.

Even if the need had not been shown, the Federal Courts have indicated a trend toward a line that proceedings before the grand jury do lie within the discretion and control of the trial judge; that a defendant and a

prosecutor are entitled to have access to those proceedings where there is *reason to believe that they had materiality.*

In *U. S. Ind. Inc. vs. U. S. District Court,* 345 Fed. Rep. 2d 18, it was held that a party seeking such disclosure need not even show a compelling need. This Court has similarly ruled.

Petitioner was permitted to inquire briefly of William Falsgraf, named in the plea in abatement, but was limited in that examination and was prohibited from any examination of the grand jury proceedings.

QUESTION NO. 3.

In Ohio under Revised Code Section 2941.54 entitled, Motion to Quash, the following statute applies:

> "A motion to quash may be made when there is a defect appearing on the face of the record, within the meaning of Sections 2941.02 to 2941.35, inclusive, of the Revised Code, including defects in the form of indictment and in the manner in which an offense is charged."

Such a motion was made in petitioner's behalf. The defect sought to be attacked was improper joinder of counts. As an alternative the court was requested to strike or force an election. As indicated by the journal entry at "Appendix F" this was denied.

The leading case in the State of Ohio pertaining to counts of embezzlement, is *State v. Glaros,* 173 Ohio St. 63, 18 Ohio Ops. 2d 284, decided January 31, 1962. In the *Glaros* case the Ohio Supreme Court held in effect that one who comes into possession of a thing of value unlawfully cannot convert or reconvert such money or property thus unlawfully obtained to his own use so as to become guilty of the crime of embezzlement.

Petitioner's position was that while vast latitude is afforded a prosecutor in Ohio in joining counts in an indictment, nevertheless the law is that this joinder is improper if the counts are completely incompatible. Thus if petitioner was accused of having forged, uttered and published various checks obtaining money thereby which belonged to Frances B. Frohring, petitioner would have acquired this money unlawfully, and therefore could not also be accused of embezzlement.

The Court of Appeals for the Seventh District in 1960 had so held in the case of *State v. Johnson,* 112 Ohio App. 124. The Court stated that:

> "Although it is well settled that under the provisions of Section 2941.04, Revised Code, great liberality exists as to the joinder for trial offenses or statements of the same offense in an indictment, and that the prosecution is not required to elect between the different offenses or accounts, nevertheless we are in agreement with the defendant that such statute cannot be construed to permit a defendant to be charged with, and found guilty at one trial of two offenses when, if tried separately, conviction of one offense would be bar to conviction thereafter of the other. In other words, if constitutional or statutory limitations would make a prior conviction of one offense a bar to conviction of a defense later charged, the same constitutional or statutory limitations should apply equally as well if both offenses are charged and tried at the same time."

The problem was further compounded because after forcing petitioner to trial on these inconsistent counts, the panel of three judges found that he was not guilty of either forgery or uttering and publishing but was guilty of embezzlement. The only testimony given the trial court came from three handwriting experts, including one who

testified as a defense witness, and all of whom testified that endorsements on the eight Paine, Webber and Jackson checks were forgeries. The defendant himself testified that he negotiated the checks but did not know the endorsements were forgeries. Therefore, the trial court further deprived the defendant of his due process by finding that he had embezzled money which came to him unlawfully, to-wit: through the medium of a forged endorsement.

An additional factor which arose from this great multiplicity of counts was the news-media attention given to it. The petitioner was a councilman, an attorney at law, the operator of the area's only radio station. The State of Ohio, by managing to triple the number of counts, was also able to increase the sensationalism of the news media reporting the indictment. This was not raised in the lower courts. The reason it was not raised was that this Court had not yet decided the case of *Sheppard v. Maxwell*, __ U. S. __, 16 L. Ed. 2d 600, 86 S. Ct. (No. 490) decided June 6, 1966.

There is no doubt, however, that the multiplicity counts contained in the indictment prejudiced the defendant's constitutional rights by increasing the sensationalism of his case; by placing him in double jeopardy; by depriving him of his right to be informed of the charges against him accurately and precisely; and finally, by confusing the trial court to such an extent that they rendered a verdict which was factually impossible under the Ohio law.

CONCLUSION.

On each of the questions presented it is respectfully submitted that a constitutional question is raised of sufficient magnitude to invite this Court's attention.

Under Quesion No. 1 the federal courts have afforded the immunity under the Fifth Amendment to a point where the appearance of a person and the production of their books and records are sufficient to persuade that their right to refuse to testify against themselves has been violated. In this case petitioner's books and records and testimony were presented to the grand jury against his will and against his knowledge and through the artifice of securing them through a civil suit.

In Question No. 2 due process was denied when the petitioner was prohibited from further inquiry into patently suspicious testimony before the grand jury.

Finally, petitioner was denied due process by the artificial multiplying of counts against him to such an extent that adverse and disproportionate publicity was engendered. He could not be precise and definitive in his defense. He was in effect placed in double jeopardy in that conviction on one of the counts should have barred conviction on others of counts.

For all of the foregoing this petitioner respectfully prays that a writ of certiorari issue from this Court and that he be given leave to present these matters on their merits.

Respectfully submitted,

BARRY M. BYRON,
RICHARD O. COLGROVE,
Attorneys for Petitioner.

APPENDIX A.

OPINION OF THE COURT OF APPEALS OF GEAUGA COUNTY, OHIO.

CASE No. 377.

IN THE COURT OF APPEALS

STATE OF OHIO, GEAUGA COUNTY, SEVENTH DISTRICT.

STATE OF OHIO,

Plaintiff-Appellee,

VS.

JAMES L. WERNER,

Defendant-Appellant.

MEMORANDUM OPINION.

(September 29, 1965.)

JOHNSON, *P.J.*

On April 7, 1964, an indictment was filed by the State of Ohio in the Geauga County Common Pleas Court pursuant to a return of a true bill by the Geauga County Grand Jury against the appellant, James L. Werner. Twenty-eight counts were alleged consisting of embezzlement, forgery, and uttering and publishing.

On April 14th, a journal entry was filed with bond set at $10,000.00 and pursuant thereto, the appellant was discharged from the custody of the Sheriff on April 18, 1964. A motion to quash or alternately to require election and/or severance of counts together with a brief in support thereof was filed on behalf of the appellant on April 22, 1964, to which the Prosecuting Attorney replied by brief on April 29, 1964, and on May 27, 1964, the Court filed its

opinion overruling the motion, which opinion was journalized on June 3, 1964.

The appellant filed a plea in abatement on June 15, 1964, and the Trial Court, in its opinion filed on June 19, 1964, and journalized on June 29, 1964, overruled the same. The appellant applied for a three judge court on August 24, 1964, the approval of which was journalized on September 8th. On September 19, 1964, pursuant to request which was made by appellant, a bill of particulars was filed. On September 23, 1964, a motion for suppression of evidence was filed by appellant and it was on this day that trial commenced before the three-judge panel.

The State of Ohio presented evidence on the 23rd, 24th and 25th of September, resting on the 25th. At that time, the defendant-appellant filed three motions to dismiss counts two, thirteen, fourteen, fifteen, seventeen, nineteen, twenty-one, twenty-three, twenty-five and twenty-seven, together with counts sixteen, eighteen, twenty, twenty-two, twenty-four, twenty-six and twenty-eight. The hearing was adjourned at the conclusion of the State's case on September 25th. Trial was not resumed until October 28, 1964, and the defense testimony took two days with final arguments being presented on the morning of October 30th. Appellant had renewed his motions before the presentation of his evidence and on October 30, 1964, the three-judge panel sustained the motions as to counts one, two, thirteen and fourteen. The Court found the appellant guilty on counts three, four, five, six, seven, eight, nine and eleven, and innocent on counts ten, twelve, and fifteen through twenty-eight. It sentenced him to the Ohio Penitentiary for one to ten years on each count, the sentences to run concurrently, and continued the bond in the amount of $10,000.00.

A motion for a new trial was filed November 2, 1964,

and overruled on November 12th. Thereafter, on November 18th, defendant-appellant filed a motion for stay of execution, and filed his notice of appeal to this Court, together with the transcript of docket and journal entries. On December 14, 1964, defendant-appellant filed a bill of exceptions containing the entire transcript of testimony taken in the Trial Court, and all exhibits therein.

We will discuss the assignments of error, where practicable, in the order in which they appear in the defendant-appellant's brief, and, for the purpose of clarity and brevity, we will, as is done in the brief, refer to the defendant-appellant as the defendant, and the plaintiff-appellee as the State.

Defendant's first assignment of error is that the Trial Court erred in overruling defendant's motion to quash or alternately require election and/or severance of counts. The first contention of the defendant under this assignment is that the counts relating to embezzlement should have been quashed because they did not state the ownership of the property alleged to have been embezzled, defendant relying on the proposition found in 19 *Ohio Jurisprudence* (2d) 264, that there is authority to the effect that in an indictment for embezzlement, the ownership of a thing embezzled must be correctly set out in the indictment. The record does not disclose any prejudicial error to defendant resulting from the lack of allegation of ownership. Therefore, this phase of the first assignment of error is not well taken. See *Charville v. State*, 6 Ohio App. 236, 27 O. C. A. 124, 28 O. C. D. 213; *Butzman v. U. S.*, 205 F. (2d) 343, certiorari denied 74 S. Ct. 50, 346 U. S. 828, 98 L. Ed. 353.

Neither can we find merit in the second phase of the first assignment, that counts one through twelve, when taken in conjunction with counts thirteen through twenty-

eight constitute a situation of inconsistency and place the defendant in double jeopardy. The question of double jeopardy could arise only if, in effect, defendant were charged twice with the same offense. This indictment charged him with three distinct types of offenses, none of which is inconsistent with any other. *State v. Glaros* case, 173 Ohio St. 63, 18 Ohio Opinions (2d) 284, relied upon by the defendant, is totally inapplicable to the case at bar. In *Glaros*, the defendant obtained the property of his employer by unlawful means, so that he could not properly be charged with having embezzled it. In the case at bar, defendant came into possession of the property of his employer by lawful means, i.e., as a result of his employment as an attorney at law entrusted with managing the business affairs of the person from whom he is alleged to have embezzled.

At this point, it is necessary to discuss some matters raised in the third assignment of error. Contrary to defendant's contention, made at page 26 of the brief, that he is not charged with embezzling checks as such, but only of embezzling funds, it must be pointed out that the counts relating to embezzlement contained in the indictment do charge him with embezzling both checks and funds. This is properly done, because a check itself is a thing of value, Section 1.03 (C), Revised Code; embodies rights, see Comment 2 of Section 1303.55, Revised Code; and may be the subject of embezzlement, Section 2907.34, Revised Code. Therefore, there was nothing inconsistent about this indictment as drawn, nor did it place the defendant in double jeopardy, and the assignment of error directed against it must fall.

The second assignment of error is also not well taken. We do not find the case of *Willie L. Short, Jr., Appellant, v. United States of America, Appellee*, 342 Fed. (2d) 863,

brought to the attention of this Court by defendant's supplemental brief, applicable to the case at bar. The *Short* case involved a person who was taken before a Grand Jury to give testimony before it without, in the view of the United States Court of Appeals, an adequate appraisal of his rights, including that to counsel. The deposition whose use is sought to be attacked in the present case, however, was obtained before any criminal prosecution was initiated. No proof appearing to the contrary, we must presume that it was taken in a lawful manner, and in good faith. Discussion of the question of the propriety of using a deposition taken in a civil proceeding as a basis for indictment is limited, but there is authority to the effect that it ought to be allowed. See *Reg. v. Bullard*, 12 Cox, C. C. 353, 14 Mook, Eng. Rep. 603 (ev.), cited in *Commonwealth of Massachusetts v. Morris A. Hayden*, 28 L. R. A. 318, at 320, and we agree with this position.

Conceding, for the purposes of argument only, that the testimony contained in the deposition is incompetent, it has been held that the submission of incompetent testimony to a grand jury does not vitiate the indictment returned by them, unless it affirmatively appears in the plea that evidence of the commission of the crime was presented, or unless all the evidence was unlawfully procured, in violation of substantial rights of the accused, so as to subject it to exclusion if offered against him. *Olmstead v. United States* (C. C. A. 9th) 19 F. (2d) 842, 53 A. L. R. 1472, affirmed in 277 U. S. 438, 72 L. ed. 944, 48 S. Ct. 564, 66 A. L. R. 376. To the same effect, see *People v. Sexton*, 187 N. Y. 495, 80 N. E. 396, 116 Am. St. Rep. 621. Defendant does not claim that the deposition contained evidence of the commission of the crimes with which he is charged. There is nothing in this record to indicate that all the evidence submitted to the Grand Jury was unlaw-

fully procured. So, we would not feel justified in reversing the conviction, on the basis of the evidence taken before the Grand Jury, even if the deposition was improperly used.

The points raised in the third assignment of error have been previously discussed.

The fourth assignment of error is that the verdict of guilty in the instant case is contrary to the manifest weight of the evidence. Having thoroughly reviewed the testimony and evidence presented in this case, we are unable to agree with this contention. We are aware that, this being a criminal case, the state must prove the defendant guilty beyond a reasonable doubt, and that, as expressed in the case of *State v. Urbaytis,* 156 Ohio St. 271, 46 Ohio Ops. 136, cited in the defendant's brief, circumstantial evidence of embezzlement "will not warrant a conviction unless it excludes every reasonable hypothesis except that of guilt." These standards are applicable at the trial level. Parenthetically, the standard is equally applicable whether it is a jury or a court who sit as the triers of fact. See *Spears v. The State of Ohio,* 2 Ohio St. 583, at 587.

However, in passing on the question of the weight of the evidence, an appellate court is faced with various problems not encountered by the Trial Court, notably that of lack of demeanor evidence. Therefore, the law imposes a different duty in regard to weight of the evidence upon an appellate court than it does upon a trial court. As stated in 3 *Ohio Jurisprudence* (2d), 821, Appellate Review, Section 821:

> "This (the requirement of proof beyond a reasonable doubt in a criminal case) does not mean that the reviewing court must be convinced beyond a reasonable doubt of the guilt of defendant below. The legal

requirement is that the evidence to convict must be of such a nature that its very character is sufficient to satisfy reasonable minds of the guilt of the defendant.

"In criminal cases a verdict cannot be said as a matter of law to be manifestly against the weight of the evidence, where there is ample evidence to sustain it. So, where in a criminal case substantial evidence is offered by the state in support of all the elements of the offense charged, and such evidence was of sufficient probative value to sustain the conviction, the reviewing court will not reverse on the sufficiency or weight of the evidence. The fact that the reviewing court may consider the evidence weak, or the fact that it is circumstantial in its nature, is not sufficient ground on which to set the judgment aside. * * *."

As previously stated, the same rules apply to a court as apply to a jury when the court sits as a trier of fact. It has been held that it is the function of the jury, and not an appellate court, to weigh the credibility of the witnesses and to weigh conflicts in the evidence. *Sandoffsky v. State,* 29 Ohio App. 419, 163 N. E. 634. See also *Atkins v. State,* 115 Ohio St. 542.

It has been held that in determining whether evidence is sufficient to go to the jury and to sustain its finding of guilt, the test is whether taking the view most favorable to the prosecution's case, a reasonably minded juror could accept the relevant evidence as adequate to support the conclusion of defendant's guilt beyond a reasonable doubt. *Riggs v. United States* (C. A. 5, Fla.), 280 F. (2d) 949; *Lambert v. United States* (C. A. 5, Ala.), 261 F. (2d) 799. See *State v. Axe,* 118 Ohio St. 514. Tested by the foregoing criteria, we find that the Trial Court's verdict was not against the weight of the evidence as a matter of law, in view of the totality of circumstantial evidence presented

by the record. Therefore, the fourth assignment of error is overruled.

For the reasons stated in the overruling of the first four assignments of error, the fifth assignment is also overruled.

The judgment of the Trial Court must be affirmed.

Judgment affirmed.

APPROVED:

/s/ NILS P. JOHNSON.

JONES, J., Concurs.
LYNCH, J., Concurs.

APPENDIX B.

JOURNAL ENTRIES OF THE COURT OF APPEALS, GEAUGA COUNTY, OHIO.

(Court of Appeals No. 377—Caption omitted.)

January 18, 1966:

This cause came on for hearing upon the appeal on questions of law, assignments of error, bill of exceptions, the transcript and the original papers and pleadings from the Court of Common Pleas of Geauga County, and was argued by counsel, on consideration whereof the Court finds no error prejudicial to the defendant-appellant, and, therefore, the judgment of the Common Pleas Court is affirmed and it is ordered that the defendant-appellant be remanded to the Common Pleas Court for execution of sentence.

To all of which defendant-appellant, by his counsel, excepts.

January 18, 1966:

This cause came on to be heard on the application for rehearing filed herein. The Court, being advised by the arguments of counsel and briefs filed herein, finds such application for rehearing not well taken and denies same.

It is, therefore, ordered that the application for rehearing be denied and the defendant-appellant be remanded to the Common Pleas Court for execution of sentence.

To all of which defendant-appellant, by his counsel, excepts.

APPENDIX C.

INDICTMENT.

(April 7, 1964.)

COURT OF COMMON PLEAS

THE STATE OF OHIO,
GEAUGA COUNTY, SS..

Of the Term April in the year of our Lord, one thousand nine hundred and sixty-four.

THE JURORS OF THE GRAND JURY of said County, on their oaths, in the name and by the authority of the State of Ohio, do find and present that James L. Werner, late of said County, on or about the eleventh day of July in the year of our Lord one thousand nine hundred and fifty-eight, and on frequent occasions thereafter, at the County of Geauga aforesaid, did while being an attorney at law, embezzle and convert to his own use and fraudulently take and make away with checks and monies and securities which came into his possession by virtue of his employment as attorney for Frances B. Frohring, Executrix of the Estate of Roger Frohring, and Frances B. Frohring as an individual, the value of same being more than Sixty Dollars, in violation of Section 2907.34 Revised Code.

COUNT TWO:

That the said James L. Werner, on or about the fourth day of February, 1959, at the County aforesaid, did, while being an Attorney at law, embezzle and convert to his own use and fraudulently take and make away with the following described check: No. 9413 dated February 4, 1959, on the account of Paine, Webber, Jackson & Curtis in the amount of Thirty-Two and 50/100 Dollars ($32.50), payable to Frances B. Frohring, drawn on the National City Bank of Cleveland, Cleveland, Ohio. Said check came

into his possession by virtue of his employment as said attorney for Frances B. Frohring, Executrix of the Estate of Roger Frohring, and Frances B. Frohring as an individual, said check and the proceeds therefrom being in the value of less than Sixty Dollars, in violation of Section 2907.34 Revised Code.

COUNT THREE:

That the said James L. Werner, on or about the twenty-second day of June, 1959, at the County aforesaid, did, while being an attorney at law, embezzle and convert to his own use and fraudulently take and make away with the following described check: No. 4583 dated June 22, 1959, on the account of Paine, Webber, Jackson & Curtis in the amount of Ten Thousand Dollars ($10,000.00), payable to Frances B. Frohring, drawn on The Cleveland Trust Company, Main office, Cleveland, Ohio. Said check came into his possession by virtue of his employment as said attorney for Frances B. Frohring, Executrix of the Estate of Roger Frohring, and Frances B. Frohring as an individual, said check and the proceeds therefrom being in the value of more than Sixty Dollars, in violation of Section 2907.34 Revised Code.

COUNT FOUR:

That the said James L. Werner, on or about the ninth day of February, 1960, at the County aforesaid, did, while being an attorney at law, embezzle and convert to his own use and fraudulently take and make away with the following described check: No. 526 dated February 9, 1960, on the account of Paine, Webber, Jackson & Curtis in the amount of Fifteen Thousand Nine Hundred Nine and 15/100 Dollars ($15,909.15), payable to Frances B. Frohring, drawn on The National City Bank of Cleveland,

Terminal Square Office 2, Cleveland, Ohio. Said check came into his possession by virtue of his employment as said attorney for Frances B. Frohring, Executrix of the Estate of Roger Frohring, and Frances B. Frohring as an individual, said check and the proceeds therefrom being in the value of more than Sixty Dollars, in violation of Section 2907.34 Revised Code.

Contrary to Sections 2907.34 and 2913.01 of the Revised Code of Ohio, and against the peace and dignity of the State of Ohio, and including Counts Five through Twenty-Eight hereto attached and made a part hereof.

/s/ EDWIN T. HOFSTETTER,
Edwin T. Hofstetter,
Prosecuting Attorney.

COUNT FIVE:

That the said James L. Werner, on or about the twenty-fourth day of February, 1960, at the County aforesaid, did, while being an attorney at law, embezzle and convert to his own use and fraudulently take and make away with the following described check: No. 573 dated February 24, 1960, on the account of Paine, Webber, Jackson & Curtis in the amount of Fourteen Thousand Six Hundred Thirty-Five and 97/100 Dollars ($14,635.97), payable to Frances B. Frohring, drawn on the National City Bank of Cleveland, Terminal Square Office 2, Cleveland, Ohio. Said check came into his possession by virtue of his employment as said attorney for Frances B. Frohring, Executrix of the Estate of Roger Frohring, and Frances B. Frohring as an individual, said check and the proceeds therefrom being in the value of more than Sixty Dollars, in violation of Section 2907.34 Revised Code.

COUNT SIX:

That the said James L. Werner, on or about the twenty-fifth day of February, 1960, at the County aforesaid, did, while being an attorney at law, embezzle and convert to his own use and fraudulently take and make away with the following described check: No. 580 dated February 25, 1960, on the account of Paine, Webber, Jackson & Curtis in the amount of Twenty-Two Thousand Eight Hundred Twenty-Two and 89/100 Dollars ($22,822.-89), payable to Frances B. Frohring, drawn on The National City Bank of Cleveland, Terminal Square Office 2, Cleveland, Ohio. Said check came into his possession by virtue of his employment as said attorney for Frances B. Frohring, Executrix of the Estate of Roger Frohring, and Frances B. Frohring as an individual, said check and the proceeds therefrom being in the value of more than Sixty Dollars, in violation of Section 2907.34 Revised Code.

COUNT SEVEN:

That the said James L. Werner, on or about the fourteenth day of February, 1962, at the County aforesaid, did, while being an attorney at law, embezzle and convert to his own use and fraudulently take and make away with the following described check: No. 7362 dated February 14, 1962, on the account of Paine, Webber, Jackson & Curtis in the amount of Eight Thousand Two Hundred Dollars ($8,200.00), payable to Frances B. Frohring, drawn on the National City Bank of Cleveland, Terminal Square Office 2, Cleveland, Ohio. Said check came into his possession by virtue of his employment as said attorney for Frances B. Frohring, Executrix of the Estate of Roger Frohring, and Frances B. Frohring as an individual, said check and the proceeds therefrom being in the value of

more than Sixty Dollars, in violation of Section 2907.34 Revised Code.

COUNT EIGHT:

That the said James L. Werner, on or about the fifth day of March, 1962, at the County aforesaid, did, while being an attorney at law, embezzle and convert to his own use and fraudulently take and make away with the following described check: No. 7445 dated March 5, 1962, on the account of Paine, Webber, Jackson & Curtis in the amount of Seven Thousand One Hundred Sixty-Six and 60/100 Dollars ($7,166.60), payable to Frances B. Frohring, drawn on The National City Bank of Cleveland, Terminal Square Office 2, Cleveland, Ohio. Said check came into his possession by virtue of his employment as said attorney for Frances B. Frohring, Executrix of the Estate of Roger Frohring, and Frances B. Frohring as an individual, said check and the proceeds therefrom being in the value of more than Sixty Dollars, in violation of Section 2907.34 Revised Code.

COUNT NINE:

That the said James L. Werner, on or about the first day of June, 1962, at the County aforesaid, did, while being an attorney at law, embezzle and convert to his own use and fraudulently take and make away with the following described check: No. 8036 dated June 1, 1962, on the account of Paine, Webber, Jackson & Curtis in the amount of Twelve Thousand Two Hundred Forty-Nine and 38/100 Dollars ($12,249.38), payable to Frances B. Frohring, drawn on The National City Bank of Cleveland, Terminal Square Office 2, Cleveland, Ohio. Said check came into his possession by virtue of his employment as said attorney for Frances B. Frohring, Executrix

of the Estate of Roger Frohring, and Frances B. Frohring as an individual, said check and the proceeds therefrom being in the value of more than Sixty Dollars, in violation of Section 2907.34 Revised Code.

COUNT TEN:

That the said James L. Werner, on or about the twenty-first day of August, 1959, at the County aforesaid, did, while being an attorney at law, embezzle and convert to his own use and fraudulently take and make away with the following described check: Security Federal Savings & Loan Association of Cleveland Check No. B 1260 dated August 21, 1959, in the amount of Two Thousand Dollars ($2,000.00), payable to James L. Werner, drawn on the First National Bank of Burton, Burton, Ohio. Said check came into his possession by virtue of his employment as said attorney for Frances B. Frohring, Executrix of the Estate of Roger Frohring, and Frances B. Frohring as an individual, said check and the proceeds therefrom being in the value of more than Sixty Dollars, in violation of Section 2907.34 Revised Code.

COUNT ELEVEN:

That the said James L. Werner, on or about the twenty-sixth day of September, 1959, at the County aforesaid, did, while being an attorney at law, embezzle and convert to his own use and fraudulently take and make away with the following described check: Security Federal Savings & Loan Association Check No. C13444 dated September 26, 1959, in the amount of Ten Thousand Dollars ($10,000.00), payable to James L. Werner, drawn on Chardon Savings Bank Co., Chardon, Ohio. Said check came into his possession by virtue of his employment as said attorney for Frances B. Frohring, Executrix of the

Estate of Roger Frohring, and Frances B. Frohring as an individual, said check and the proceeds therefrom being in the value of more than Sixty Dollars, in violation of Section 2907.34 Revised Code.

COUNT TWELVE:

That the said James L. Werner, on or about the twelfth day of April, 1962, at the County aforesaid, did, while being an attorney at law, embezzle and convert to his own use and fraudulently take and make away with the following described check: Security Federal Savings & Loan Association of Cleveland Check No. B 3751 dated April 12, 1962, in the amount of Three Hundred Fifty-Six and 97/100 Dollars ($356.97), payable to James L. Werner, drawn on The First National Bank of Burton, Burton, Ohio. Said check came into his possession by virtue of his employment as said attorney for Frances B. Frohring, Executrix of the Estate of Roger Frohring, and Frances B. Frohring as an individual, said check and the proceeds therefrom being in the value of more than Sixty Dollars, in violation of Section 2907.34 Revised Code.

COUNT THIRTEEN:

That the said James L. Werner, in said County on or about the fourth day of February, 1955, did with intent to defraud, falsely forge the signature of Frances B. Frohring as endorser on the following described check: No. 9413 dated February 4, 1959, on the account of Paine, Webber, Jackson & Curtis in the amount of Thirty-Two and 50/100 Dollars ($32.50), payable to Frances B. Frohring, drawn on the National City Bank of Cleveland, Cleveland, Ohio, in violation of Section 2913.01 Revised Code.

COUNT FOURTEEN:

That the said James L. Werner, in said County on said date, did, with intent to defraud, utter and publish said forged check as true and genuine, knowing the endorsement thereof to be forged, in violation of Section 2913.01 Revised Code.

COUNT FIFTEEN:

That the said James L. Werner, in said County on or about the twenty-second day of June, 1959, did, with intent to defraud, falsely forge the signature of Frances B. Frohring as endorser on the following described check: No. 4583 dated June 22, 1959, on the account of Paine, Webber, Jackson & Curtis in the amount of Ten Thousand Dollars ($10,000.00), payable to Frances B. Frohring, drawn on the Cleveland Trust Company, Main Office, Cleveland, Ohio, in violation of Section 2913.01 Revised Code.

COUNT SIXTEEN:

That the said James L. Werner, in said County on said date, did, with intent to defraud, utter and publish said forged check as true and genuine, knowing the endorsement thereof to be forged, in violation of Section 2913.01 Revised Code.

COUNT SEVENTEEN:

That the said James L. Werner, in said County on or about the ninth day of February, 1960, did, with intent to defraud, falsely forge the signature of Frances B. Frohring as endorser on the following described check: No. 526 dated February 9, 1960, on the account of Paine, Webber, Jackson & Curtis in the amount of Fifteen Thousand Nine

Hundred Nine and 15/100 Dollars ($15,909.15), payable to Frances B. Frohring, drawn on The National City Bank of Cleveland, Terminal Square Office 2, Cleveland, Ohio, in violation of Section 2913.01 Revised Code.

COUNT EIGHTEEN:

That the said James L. Werner, in said County on said date, did, with intent to defraud, utter and publish said forged check as true and genuine, knowing the endorsement thereof to be forged, in violation of Section 2913.01 Revised Code.

COUNT NINETEEN:

That the said James L. Werner, in said County on or about the twenty-fourth day of February, 1960, did, with intent to defraud, falsely forge the signature of Frances B. Frohring as endorser on the following described check: No. 573 dated February 24, 1960, on the account of Paine, Webber, Jackson & Curtis in the amount of Fourteen Thousand Six Hundred Thirty-Five and 97/100 Dollars ($14,635.97), payable to Frances B. Frohring, drawn on The National City Bank of Cleveland, Terminal Square Office 2, Cleveland, Ohio, in violation of Section 2913.01 Revised Code.

COUNT TWENTY:

That the said James L. Werner, in said County on said date, did, with intent to defraud, utter and publish said forged check as true and genuine, knowing the endorsement thereof to be forged, in violation of Section 2913.01 Revised Code.

COUNT TWENTY-ONE:

That the said James L. Werner, in said County on or about the twenty-fifth day of February, 1960, did, with intent to defraud, falsely forge the signature of Frances B. Frohring as endorser on the following described check: No. 580, dated February 25, 1960, on the account of Paine, Webber, Jackson & Curtis in the amount of Twenty-Two Thousand Eight Hundred Twenty-Two and 89/100 Dollars ($22,822.89), payable to Frances B. Frohring, drawn on The National City Bank of Cleveland, Terminal Square Office 2, Cleveland, Ohio, in violation of Section 2913.01 Revised Code.

COUNT TWENTY-TWO:

That the said James L. Werner, in said County on said date, did, with intent to defraud, utter and publish said forged check as true and genuine, knowing the endorsement thereof to be forged, in violation of Section 2913.01 Revised Code.

COUNT TWENTY-THREE:

That the said James L. Werner, in said County on or about the fourteenth day of February, 1962, did, with intent to defraud, falsely forge the signature of Frances B. Frohring as endorser on the following described check: No. 7362 dated February 14, 1962, on the account of Paine, Webber, Jackson & Curtis in the amount of Eight Thousand Two Hundred Dollars ($8,200.00), payable to Frances B. Frohring, drawn on The National City Bank of Cleveland, Terminal Square Office 2, Cleveland, Ohio, in violation of Section 2913.01 Revised Code.

COUNT TWENTY-FOUR:

That the said James L. Werner, in said County on said date, did, with intent to defraud, utter and publish said forged check as true and genuine, knowing the endorsement thereof to be forged, in violation of Section 2913.01 Revised Code.

COUNT TWENTY-FIVE:

That the said James L. Werner, in said County on or about the fifth day of March, 1962, did, with intent to defraud, falsely forge the signature of Frances B. Frohring as endorser on the following described check: No. 7445 dated March 5, 1962, on the account of Paine, Webber, Jackson & Curtis in the amount of Seven Thousand One Hundred Sixty-Six and 60/100 Dollars ($7,166.60), payable to Frances B. Frohring, drawn on The National City Bank of Cleveland, Terminal Square Office 2, Cleveland, Ohio, in violation of Section 2913.01 Revised Code.

COUNT TWENTY-SIX:

That the said James L. Werner, in said County on said date, did, with intent to defraud, utter and publish said forged check as true and genuine, knowing the endorsement thereof to be forged, in violation of Section 2913.01.

COUNT TWENTY-SEVEN:

That the said James L. Werner, in said County on or about the first day of June, 1962, did, with intent to defraud, falsely forge the signature of Frances B. Frohring as endorser on the following described check: No. 8036

dated June 1, 1962, on the account of Paine, Webber, Jackson & Curtis in the amount of Twelve Thousand Two Hundred Forty-Nine and 38/100 Dollars ($12,249.38), payable to Frances B. Frohring, drawn on The National City Bank of Cleveland, Terminal Square Office 2, Cleveland, Ohio, in violation of Section 2913.01 Revised Code.

COUNT TWENTY-EIGHT:

That the said James L. Werner, in said County on said date, did, with intent to defraud, utter and publish said forged check as true and genuine, knowing the endorsement thereof to be forged, in violation of Section 2913.01 Revised Code.

APPENDIX D.

JOURNAL ENTRIES OF THE COURT OF COMMON PLEAS, GEAUGA COUNTY, OHIO.

No. 4447.

IN THE COURT OF COMMON PLEAS

STATE OF OHIO, GEAUGA COUNTY, SS.

STATE OF OHIO,

Plaintiff,

vs.

JAMES L. WERNER,

Defendant.

JOURNAL ENTRY.

(October 30, 1964.)

This matter came on for trial before three judges, the defendant having waived his right to trial by jury and elected to be tried by a court of three judges. During the course of the trial, Counts One, Two, Thirteen, and Fourteen were quashed by the Court. The trial then went forward and testimony was heard with regard to Counts Three through Twelve and Counts Fifteen through Twenty-Eight. After hearing all of the evidence, it is the verdict of this Court that the defendant is guilty as charged as to Counts Three through Nine and as to Count Eleven. The Court further finds the defendant not to be guilty of Counts Ten, Twelve, and Fifteen through Twenty-Eight.

Specifically, the Court finds the defendant guilty as follows:

1. Guilty, as charged in Count Three, of embezzlement, in violation of R. C. 2907.34, with regard to a Ten

Thousand Dollar ($10,000.00) check and the proceeds thereof.

2. Guilty, as charged in Count Four, of embezzlement, in violation of R. C. 2907.34, with regard to a Fifteen Thousand Nine Hundred and 15/100 Dollar ($15,909.15) check and the proceeds thereof.

3. Guilty, as charged in Count Five, of embezzlement, in violation of R. C. 2907.34, with regard to a Fourteen Thousand Six Hundred Thirty-Five and 97/100 Dollar ($14,635.97) check and the proceeds thereof.

4. Guilty, as charged in Count Six, of embezzlement, in violation of R. C. 2907.34, with regard to a Twenty-Two Thousand Eight Hundred Twenty-Two and 89/100 Dollar ($22,822.89) check and the proceeds thereof.

5. Guilty, as charged in Count Seven, of embezzlement, in violation of R. C. 2907.34, with regard to an Eight Thousand Two Hundred Dollar ($8,200.00) check and the proceeds thereof.

6. Guilty, as charged in Count Eight, of embezzlement, in violation of R. C. 2907.34, with regard to a Seven Thousand One Hundred Sixty-Six and 60/100 Dollar ($7,166.60) check and the proceeds thereof.

7. Guilty, as charged in Count Nine, of embezzlement, in violation of R. C. 2907.34, with regard to a Twelve Thousand Two Hundred Forty-Nine and 38/100 Dollars ($12,249.38) check and the proceeds thereof.

8. Guilty, as charged in Count Eleven, of embezzlement, in violation of R. C. 2907.34, with regard to a Ten Thousand Dollar ($10,000.00) check and the proceeds thereof.

The defendant was then asked if he had anything to say before the passing of sentence, and the defendant had nothing to say.

It is, therefore, the judgment of this Court that the defendant be sentenced to the Ohio State Penitentiary for a term of not less than one or more than ten years on each of said eight counts, said sentences to run concurrently.

The Court thereupon heard the defendant's oral motion for a stay of execution pending the filing of the defendant's appeal. Said motion is hereby granted, conditioned upon defendant filing said written motion for stay of execution forthwith, and the defendant is hereby released and his bond of Ten Thousand Dollars ($10,000.00) is continued, conditioned upon his bonding company approving such action.

/s/ ROBERT B. FORD,
Robert B. Ford, *Presiding Judge.*

November 12, 1964:

This cause came on for further hearing on the defendant's motion for new trial, upon consideration of which the Court finds that said motion is not well taken, and same is therefore overruled.

/s/ ROBERT B. FORD,
Judge,
/s/ ROBERT J. GABEL,
Judge,
/s/ DELBERT L. TEDRICK,
Judge.

APPENDIX E.

OPINION OF THE COURT OF COMMON PLEAS, GEAUGA COUNTY, OHIO.

(June 19, 1964.)

(Court of Common Pleas No. 4447—Caption omitted.)

This matter came on for hearing and on the testimony, briefs and arguments. The gist of the defendant's plea in abatement is to the point that portions of an incriminating deposition were read from by a witness in his testimony to the Grand Jury, and that one of the witnesses was mentally incompetent. The State made and preserved its objection to any evidence as to what witness said or did while in the Grand Jury hearing.

Defendant's counsel at various times has argued that the modern trend is for greater discovery, a la civil procedure, in criminal matters and has cited statutory and some case authority. Further, he maintains that the Court in the interest of justice has the responsibility to relax secrecy and supervise inquiry of grand jury deliberations; *Schmidt v. U. S.*, 115 Fed. 2d 394.

The Court must rule first on the offer of evidence, for without the evidence the plea in abatement must fail.

A review of the law reveals some surprising holdings. The nephew of the murdered man has sat on the grand jury indicting; the prosecutor has requested the return of an indictment; the prosecutor remained in the room during deliberation; and in none of these seemingly outrageous situations was the indictment upset. A grand jury may indict on the personal knowledge or information of one of its members. There is an almost irrebuttable presumption that the Grand Jury performed its duty and indicted upon sufficient evidence. The grand jury does not determine guilt or innocence, it merely decides where

there is probable cause or sufficient evidence to require an accused to stand trial. The grand jury does not exercise a judicial function, it merely determines a probability of guilt.

This Grand Jury was charged by the Court that rumor and hearsay testimony should be disregarded and that no person may be compelled to testify against himself.

Despite defendant's exhibits and recitals therein, there is no evidence of actual adjudication of the alleged mentally incompetent witness. She did have and probably still has some mental disability and she is under guardianship though the latter may well be one of business inexperience and convenience rather than mental incompetence. Such a person is not per se an unreliable or unintelligent witness, but the Court agrees generally with the procedure suggested in defendant's brief.

The testimony indicates that a witness saw portions of the deposition during his testimony before the Grand Jury.

There is no allegation or proof that either the testimony of the allegedly incompetent witness or the testimony of the witness who refreshed his recollection from the deposition was all the testimony.

A plea in abatement will be denied where the plea does not say and the testimony does not show that the offensive or wrongfully admitted evidence was the sole evidence the Grand Jury had to consider; see *Lindsey v. State*, 69 Oh. St. 215.

The Court is of the opinion that no evidence should be received from grand jurors, witnesses, or any other person in the grand jury room, as to what evidence was presented to that forum by the prosecuting attorney or any other person; see 26 *Oh. Jur.* 2d Sec. 46, p. 290.

Therefore, in view of the above authority and assuming that (1) the testimony of the alleged incompetent, and (2) that by witness reading from the deposition, defendant was compelled to incriminate himself, and assuming the prejudicial character in both instances, the plea in abatement must be denied as there is no allegation or proof that such evidence was the only evidence upon which the Grand Jury relied.

The tradition of secrecy in grand jury deliberations is a most ancient one and one not lightly ignored. It is the only part of the judicial machinery where absolute secrecy is required. It protects the grand jurors, the witnesses and the innocent accused from unjust exposure to vicious calumny, rumor, hatred or ill-will. This Court will not disturb the secrecy of this Grand Jury's deliberations on the facts now before the Court.

ROBERT B. FORD, *Judge.*

JOURNAL ENTRY OF THE COURT OF COMMON PLEAS, GEAUGA COUNTY, OHIO.

(June 29, 1964.)

(Court of Common Pleas No. 4447—Caption Omitted.)

This cause came on for hearing on defendant's plea in abatement. After reading the briefs submitted and the law applicable, the plea in abatement is hereby denied.

Defendant's exceptions are noted.

APPENDIX F.

JOURNAL ENTRY OF THE COURT OF COMMON PLEAS, GEAUGA COUNTY, OHIO.

(April 22, 1964.)

(Court of Common Pleas No. 4447—Caption Omitted.)

Now comes the Prosecuting Attorney on behalf of the State of Ohio, and the defendant appearing in Court with counsel waived the reading of the Indictment. The defendant filed his written motion to quash the Indictment, along with his brief thereon. He further moved orally for argument on the motion at an early date to be set by the Court, which motion was granted. No further action on the arraignment until ruling on the above motion to quash is had.

OPINION OF THE COURT OF COMMON PLEAS OF GEAUGA COUNTY, OHIO.

(May 27, 1964.)

(Court of Common Pleas No. 4447—Caption Omitted.)

The defendant's motion to quash, in gist, as to the first twelve counts is to the effect that the indictment does not state who owned the property; that the indictment offends for duplicity; that with counts 13-28 there is double jeopardy; that it is repetitious; that counts 2-11 contain more than three years. The motion to quash as to counts 13-28 alleges duplicity and double jeopardy. Lastly the motion cites irregularities, or alleged irregularities, in the grand jury's actions.

It is the opinion of this Court that grand jury irregu-

larities such as alleged, are things extrinsic to the indictment and record of this case to date and therefore cannot be reached by a motion to quash. Ohio Revised Code Sec. 2941.54.

The motion to quash as to counts 13-28 is denied. There is no double jeopardy; two actions are recited, (1) the forging of the check, and (2) as to that check in a following count, the uttering and publishing of said check. Two crimes as to each check are charged and said crimes are not greater and lesser offenses. Nor are the charges offensive from the standpoint of duplicity. The case relied upon by defendant, *State v. Johnson*, 112 Oh. App. 124, fails to support his position.

> "Duplicity applies to the joinder of separate and distinct offenses in one and the same count."

Even should this Court adopt a broader definition, i.e., a misjoinder of offenses in the indictment, it is difficult to see how the *Johnson* case, *supra*, is of assistance.

Before ruling on the motion as to counts 1-12, a review of the embezzlement section (Ohio Revised Code Sec. 2907.34) is necessary. Stripped to bare essentials one must have one of the statutory relationships, here—attorney; property of value must come to accused by reason of this relationship; the defendant must have converted this property to his own use. See also *State v. Urbaytis*, 156 Oh. St. 271, Syl. 1.

The Court agrees in part with defendant in that it might be an "air-clearing" recital to state who owns the property, but since one cannot convert one's own property and since the statute does not specifically require the recital and since the recital would add little, ownership this Court holds is not a necessary allegation. Further, it is the opinion of this Court that a thorough reading of *State*

v. Glaros, 85 O. L. A. 417 and 19 *Oh. Jur.* 2d Sec. 36, discloses no support for defendant's exact legal position. Counts 1-12 are not duplicitous nor is there double jeopardy. Count 1 from the face of the indictment and from the argument of the State, is not necessarily repetitious.

The three year time period is not a statute of limitations and the State need not elect which three years is involved until the proof is in.

The Court is further of the opinion that Ohio Revised Code Sec. 2941.28 is also determinative of at least some of the elements of the motion and that a serious point may arise at a later time in the trial as to a situation similar to that described in the paragraph beginning at the bottom of page 130 and ending at the top of page 131 in *State v. Johnson*, 112 Oh. App. 124.

Motion to quash as to all counts denied. Defendant's exceptions noted. State prepare entry.

ROBERT B. FORD, *Judge.*

JOURNAL ENTRY OF THE COURT OF COMMON PLEAS OF GEAUGA COUNTY, OHIO.

(June 3, 1964.)

(Court of Common Pleas No. 4447—Caption Omitted.)

This cause came on for hearing on the motion of the defendant to quash the said indictment and alternately to require election and/or severance of counts. After hearing oral argument and reading briefs for and against said motion, the same is hereby overruled.

Defendant's exceptions are noted.

APPENDIX G.

JOURNAL ENTRIES OF THE SUPREME COURT OF OHIO.

No. 40,081.

THE SUPREME COURT

THE STATE OF OHIO, CITY OF COLUMBUS.

THE STATE OF OHIO,

Plaintiff-Appellee,

vs.

JAMES L. WERNER,

Defendant-Appellant.

June 8, 1966:

It is ordered by the Court that this motion is overruled.

June 8, 1966:

This cause, here on appeal as of right from the Court of Appeals for Geauga County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that the appellee recover from the appellant its costs herein expended; that a mandate be sent to the Court of Common Pleas to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Geauga County for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

APPENDIX H.

CONSTITUTIONAL PROVISIONS AND STATUTES.

Constitution of the United States.

AMENDMENT V.

(RIGHTS OF PERSONS)

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Constitution of Ohio, 1851

ARTICLE I, SECTION 10.

(Trial of accused persons and their rights; depositions by state and comment on failure of accused to testify in criminal cases.)

"Except in cases of impeachment, cases arising in the army and navy, or in the militia when in actual service in time of war or public danger, and cases involving offenses for which the penalty provided is less than imprisonment in the penitentiary, no person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury; and the number of persons necessary to constitute such grand jury and the number thereof necessary to concur in finding such indictment shall be determined by law. In any trial, in any

court, the party accused shall be allowed to appear and defend in person and with counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process to procure the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed; but provision may be made by law for the taking of the deposition by the accused or by the state, to be used for or against the accused, of any witness whose attendance can not be had at the trial, always securing to the accused means and the opportunity to be present in person and with counsel at the taking of such deposition, and to examine the witness face to face as fully and in the same manner as if in court. No person shall be compelled, in any criminal case, to be a witness against himself; but his failure to testify may be considered by the court and jury and may be made the subject of comment by counsel. No person shall be twice put in jeopardy for the same offense." (As amended September 3, 1912.)

Revised Code of Ohio, Section 2941.04. Two or more offenses in one indictment.

"An indictment or information may charge two or more different offenses connected together in their commission, or different statements of the same offense, or two or more different offenses of the same class or crimes or offenses, under separate counts, and if two or more indictments or informations are filed in such cases the court may order them to be consolidated.

"The prosecution is not required to elect between the different offenses or counts set forth in the indictment or

information, but the defendant may be convicted of any number of the offenses charged, and each offense upon which the defendant is convicted must be stated in the verdict. The Court in the interest of justice and for good cause shown, may order different offenses or counts set forth in the indictment or information tried separately or divided into two or more groups and each of said groups tried separately. A verdict of acquittal of one or more counts is not an acquittal of any other count."

Revised Code of Ohio, Section 2913.01. Forgery.

"No person, with intent to defraud, shall falsely make, alter, forge, counterfeit, print, or photograph a record or other authentic matter of a public nature, a license or certificate authorized by law, a charter, letters patent, deed, lease, writing obligatory, will, testament, annuity, bond, covenant, bank bill or note, check, bill of exchange, contract, promissory note for the payment of money or other property, or any promise to pay money conditionally, an acceptance of a bill of exchange, the number or principal sum of an accountable receipt for a note, an order, warrant, or request for the payment of money or the delivery of goods or chattels, an acquittance or receipt either for money or goods, an acquittance, release, or discharge of a debt, account, action, suit, demand, or other thing, real or personal, a plat, draft, or survey of goods, chattels, or other property, a letter of attorney, a power to receive money or receive and transfer stock or annuities, or to let, lease, dispose of, alien, or convey goods, chattels, lands, tenements, or other estate, real or personal, or a bill, order, or warrant drawn by an auditor for the payment of money at a public treasury, or, with like intent, utter or publish as true and genuine such false, altered, forged, counter-

feited, falsely printed, or photographed matter, knowing it to be false, altered, forged, counterfeited, falsely printed, or photographed.

"Whoever violates this section is guilty of forgery, and shall be imprisoned not less than one nor more than twenty years."

Revised Code of Ohio, Section 2907.34. Embezzlement or fraudulent conversion.

"No officer, attorney at law, agent, clerk, guardian, executor, executrix, administrator, administratrix, trustee, assignee in solvency, receiver, officer of a lodge or subordinate body of a fraternal or mutual benefit society, servant, or employee of a person, except apprentices or persons under eighteen years of age, shall embezzle or convert to his own use, fraudulently take or make away with, or secrete with intent to embezzle or convert to his own use anything of value which comes into his possession by virtue of his election, appointment, or employment thereto.

"Whoever violates this section shall be imprisoned not less than one nor more than ten years if the total value of the property embezzled in the same continuous employment or term of office, whether embezzled at one time or at different times within three years prior to the inception of the prosecution, is sixty dollars or more. If such total value is less than sixty dollars, such person shall be fined not more than three hundred dollars or imprisoned not more than ninety days, or both."

APPENDIX I.

PLEA IN ABATEMENT.

(June 15, 1964.)

(Court of Common Pleas No. 4447—Caption omitted.)

Now comes the defendant, James Werner, and says that the State of Ohio ought not to further prosecute in the said indictment against him, which indictment was returned by the Grand Jury of Geauga County during the April Term 1964, for the reason that the said indictment and counts thereof, for forgery, embezzlement and uttering and publishing, and activity of the Prosecuting Attorney attendant thereto, compelled and coerced him to become a witness against himself by the following artifice:

On November 22, 1963, a civil suit was filed against this defendant and others by the guardian and advisors of one Frances Frohring who was at the said time and place an adjudged incompetent; that on or about the 17th day of December, 1963, pursuant to notification and subpoena issued in the said civil cause, this defendant was compelled to appear before a Notary Public to be cross-examined as an adversary party and was compelled by the dictates of the said subpoena to bring in all of his records, documents, and other indicia of his relationship to the said Frances Frohring; that the said deposition was adjourned and continued until the 2nd day of January, 1964, at which time this defendant gave further testimony under cross-examination; that the aforesaid deposition was thereupon reduced to writing upon the order of the attorneys for the said Frances Frohring, to-wit: William Falsgraf and Ivan Miller of Falsgraf, Kundtz, Reidy and Shoup and James Dinsmore of Thrasher, Dinsmore and Dolan, and the original thereof was procured and purchased by the said attorneys for Frances Frohring.

Defendant further says, in support of the Plea in Abatement, that the original or copy of the deposition purchased on behalf of the said incompetent Frances Frohring was subsequently turned over to the Prosecuting Attorney of Geauga County and that the said original or a copy thereof was in the Prosecuting Attorney's hands up and until the convening of the Grand Jury for the April Term 1964; that at the time of deliverance of the Grand Jury, the Prosecutor, then and there contriving to obtain the said indictment, used the deposition taken from this defendant directly and through witnesses called for that purpose including one of the attorneys for the said Frances Frohring, William Falsgraf.

Defendant further says that in obtaining this deposition pursuant to the civil matter and the use to which it was put before the Grand Jury for the purpose of obtaining the said indictment was a patent device by which the Prosecuting Attorney and the attorneys for the said Frances Frohring obtained an indictment against this defendant by contriving to cause him to testify against himself in direct derogation of Article I, Section 10 of the Ohio Constitution which provides in part that "no person shall be compelled, in any criminal case, to be a witness against himself; that at no time was this defendant consulted nor was request made to this defendant for permission to use his deposition before the Grand Jury and that by the devious activities of the said persons the privilege afforded this defendant as well as all citizens of the State of Ohio, was circumvented and avoided and this defendant was deprived thereby of inalienable right presumably guaranteed him under the Constitution of the State of Ohio.

Defendant further says that one of the witnesses presented to the Grand Jury in support of the Prosecutor's efforts to obtain the within indictment was the said

Frances Frohring herself; that the said witness was and is legally adjudicated incompetent and was presented as a witness against this defendant without any adjudication investigation or explanation as to her ability to recollect and understand the nature of her testimony in fact, the nature of an oath; that the matter concerned which the said Frances Frohring was called upon to testify involves, intricate and complicated financial transactions extending back four years and that the witness has in fact, been held incapable of handling even her day-to-day affairs and reportedly acknowledged her incapacity by having consented to the appointment of a guardian and thereby acknowledging her inability of understanding and recollecting her present day affairs.

All of this, he the said James Werner, is ready to verify; wherefore he prays judgment and that by the Court he may be dismissed and discharged from the said premises in the said indictment specified.

JAMES WERNER

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In the Supreme Court of the United States

OCTOBER TERM, 1966.

No. 746.

JAMES L. WERNER,
Petitioner,

v.

STATE OF OHIO,
Respondent.

BRIEF OF RESPONDENT
In Opposition to Petition for Writ of Certiorari To the Court of Appeals, Geauga County, Ohio, Seventh Judicial District of Ohio.

WILLIAM SAXBE,
Attorney General, State of Ohio,
State House, Columbus, Ohio,

EDWIN T. HOFSTETTER,
Geauga County Prosecuting Attorney,

GENE HENRY,
Asst. Prosecuting Attorney,
213 Main Street, Chardon, Ohio,
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In the Supreme Court of the United States

OCTOBER TERM, 1966.

No. 746.

JAMES L. WERNER,

Petitioner,

v.

STATE OF OHIO,

Respondent.

BRIEF OF RESPONDENT

In Opposition to Petition for Writ of Certiorari To the Court of Appeals, Geauga County, Ohio, Seventh Judicial District of Ohio.

STATEMENT OF FACTS.

On February 8, 1958, Roger L. Frohring died accidentally. His widow, Frances B. Frohring, retained the law firm of Werner and Smith, Chardon, Ohio, to aid her in administering his estate. Her initial contact was with Ced L. Smith, but thereafter the petitioner James L. Werner handled the client relationship almost exclusively. The original Will of Roger L. Frohring was stolen prior to his death. Thieves had made off with a safe in which the original had been kept. A copy of the Will, which had been prepared by the Cleveland law firm of Falsgraf, Kundtz, Reidy and Shoup (R. 37), was admitted to probate on May 10, 1958. On May 20, 1958, Frances B. Frohring was approved as the executrix. On May 28, 1958, the Inventory and Appraisal was filed showing that the estate consisted of the following assets:

PERSONAL PROPERTY:	
Chevrolet station wagon	$ 900.00
Truck	1,200.00
STOCK:	
Newbury Industries, 1600 shares	30,176.00
Newbury Hardware, 76 shares	9,880.00
American Home Products, 1350 shares	122,850.00
First National Bank of Burton, 10 shares	600.00
REAL ESTATE:	114,750.00
TOTAL	$280,356.00

On June 3, 1959, an Application for the Determination of the State Inheritance Tax was filed. In addition to the assets already named, it included the following items which were subject to tax:

Joint checking account	$ 4,838.19
Insurance contract	59,780.00

Among the deductions on the Application for Determination of Inheritance Tax was listed $26,300.00 for Federal Estate Tax. Petitioner testified he did not think that a Federal Estate Tax was due (R. 65). Nevertheless it was listed as a deduction (R. 65). He never prepared the Federal Estate Tax forms, nor was a Federal Estate Tax declaration ever filed, nor was the tax paid. On June 17, 1963, the State Inheritance Tax of $5,523.66 was paid, including interest of $1,036.77.

On May 5, 1958, Frances B. Frohring received $55,492.58 in the form of an insurance check payable to her as the beneficiary of her deceased husband's life insurance. Of this she used approximately $16,500.00 to pay a debt to The First National Bank of Burton, and the balance of $38,000.00 she turned over to James L. Werner in the form of a bank check payable to him. On June 8,

1959, the Newbury Hardware stock in the estate was sold for $12,000.00, $8,000.00 of which was in the form of a check payable to Frances B. Frohring and the balance of $4,000.00 in the form of a promissory note payable to Frances B. Frohring. The $8,000.00 check was endorsed by Frances B. Frohring and turned over to James L. Werner.

On July 11, 1958, the petitioner opened a brokerage account with Paine, Webber, Jackson and Curtis in the name of Frances B. Frohring, with instructions to the brokerage firm to send all checks and communications to him. The petitioner failed to return forms required by the brokerage house which were supposed to have been signed by Mrs. Frohring indicating her approval that said checks and other communications be sent directly to petitioner. Frances B. Frohring never knew of the Paine-Webber account.

On July 11, 1958, the petitioner opened a savings account with the Security Federal Savings & Loan Association, Chardon, Ohio, in the name of James L. Werner, Trustee for Frances B. Frohring, in the sum of $10,000.00. Frances B. Frohring never knew of this account. On February 9, 1960, on February 24, 1960, and on February 25, 1960, the petitioner received checks in the respective sums of $15,909.15, $14,635.97, and $22,822.89 from Paine, Webber, Jackson and Curtis, which had acted as the brokerage house in the sale of American Home stock for $53,368.01. Each check was payable to Frances B. Frohring, bears her forged endorsement, and the second endorsement bears the stamp of the Geauga Broadcasting Company, a corporation owned and controlled by the petioner and his wife.

On June 23, 1959, the petitioner received a Paine-Webber check dated June 22, 1959, for $10,000.00 payable

to Frances B. Frohring, bearing her forged endorsement and the stamp of Werner and Smith as the second endorser. This check was negotiated June 23, 1959. This check was deposited to the account of Werner and Smith and their testimony is that it represented attorneys' fees, of which $6,500.00 went to the petitioner and $3,500.00 to Smith. Frances B. Frohring never knew of this check or that Werner and Smith were paid the sum of $10,000.00 in attorneys' fees.

Petitioner admitted negotiating each of the Paine-Webber checks (R. 616). He admitted that each Paine-Webber check payable to Frances Frohring was sent directly from Paine, Webber, Jackson and Curtis to him. Both the State and defense handwriting experts agree that Frances Frohring's endorsement on each Paine-Webber check is forged.

On September 28, 1959, the petitioner withdrew $10,000.00 from the said Security Federal Savings & Loan Association Trust Savings Account, payable to himself as an individual. This was endorsed "James L. Werner" and sent to the Central National Bank of Cleveland, which acted as escrow agent for the deposit of funds in the formation of The Geauga County National Bank. Petitioner admitted this $10,000.00 was added to $15,000.00 of other funds to enable him to buy $25,000.00 worth of stock in said bank in his name as an individual. This purchase of stock enabled the petitioner to become a director in said bank. Frances B. Frohring was never informed of this transaction involving money held in trust for her. On February 14, 1962, a Paine-Webber check in the sum of $8,200.00 payable to Frances B. Frohring, bearing her forged endorsement and the second written endorsement "Geauga Broadcasting Company by James L. Werner," was negotiated. On March 5, 1962, a Paine-Webber check

in the sum of $7,166.60, bearing Frances B. Frohring's forged endorsement and the second endorsement of James L. Werner, was negotiated. On June 1, 1962, a Paine-Webber check in the sum of $12,249.38 payable to Frances B. Frohring, bearing her forged endorsement and the second endorsement of James L. Werner, was negotiated. Mrs. Frohring knew of none of these checks, nor that they had been forged, nor that the petitioner James L. Werner had received the benefit of same.

In early 1958 the Geauga Broadcasting Company was incorporated, the incorporators being James L. Werner, his wife, and Ced L. Smith. The petitioner and his wife were officers and directors. Ced L. Smith was named Vice-President and Fred Austin was named the Treasurer. The issuance of stock was never recorded with the Securities Division of the State of Ohio. The petitioner maintained that money he received from Frances B. Frohring was received with her knowledge and that she was credited with $40,000.00 worth of stock and $30,000.00 worth of debentures in said Geauga Broadcasting Company. No stock nor debentures were ever issued to Frances B. Frohring, nor were they ever filed with the Securities Division of the State of Ohio. However, Mrs. Frohring did receive monthly interest payments beginning in early 1960 which she understood to be interest for debentures in said broadcasting company. Neither Ced L. Smith, who was an officer in said broadcasting company, nor Fred Austin, who was the treasurer of said company, knew of the debentures or of the stock interest supposedly had by Frances B. Frohring. They testified that they had no knowledge that Mrs. Frohring had any interest in the broadcasting company, nor had they any knowledge that any of her money was being used in the broadcasting company (R. 143, 133).

According to Mr. Austin the Ownership Report was filed with the Federal Communications Commission in 1961 (R. 130) and the report indicated that only the petitioner and his wife were the owners or had an interest in said broadcasting company. However, the petitioner testified that the debentures were issued to Mrs. Frohring in February of 1960. The evidence also shows (R. 145) that Ced L. Smith, member of the firm of Werner and Smith, had no knowledge of the Paine-Webber account in the name of Mrs. Frohring, nor had he any knowledge of the savings account in the Security Federal Savings and Loan Association. Mr. Smith testified that it was customary with the firm for the fiduciary to open a fiduciary account in the administration of an estate, but in the handling of the Frohring estate no fiduciary account was opened (R. 152). Instead, the funds from the Estate of Roger L. Frohring and from Mrs. Frohring as an individual were co-mingled in the James L. Werner escrow account with other funds.

On April 1, 1963, Frances B. Frohring was committed to Fairhill Hospital as being incompetent and a guardian was appointed for her, said guardian being her daughter, Jean Sargent. Mrs. Sargent retained the law firm of Falsgraf, Kundtz, Reidy and Shoup of Cleveland to represent her in the guardianship proceedings. In order to prepare the income tax and to prepare the inventory for the guardianship, Mr. William Falsgraf attempted to get information from the petitioner. On June 12, 1963, Mr. Falsgraf sent the demand to the petitioner, signed by the guardian, Jean Sargent, and by Frances Frohring. It reads as follows and is reported on R. 42:

"Dear Mr. Werner:

"I want you to turn over to William Falsgraf all of the documents, tax returns, check books and other

records which you have in your possession and which pertain to the administration of the estate of my late husband, Roger Frohring. I also want you to turn over to Mr. William Falsgraf any stock certificates, savings or check books or other records which you might have in your possession pertaining to my personal affairs.

"Very truly yours,
"Frances Frohring
"Frances Frohring, Executrix
of the Estate of Roger Frohring
"Jean Sargent,
Guardian of Frances Frohring"

This letter is State's Exhibit 3.

On June 18, 1963, in response to this letter, a recapitulation or accounting prepared by defendant, which is State's Exhibit 4, was delivered to Mr. Falsgraf (R. 45). This accounting represented that the petitioner received $65,720.97 from Mrs. Frohring and from the Estate of Roger Frohring, and that he paid out said sum and itemized such disbursements. Gradually Mr. Falsgraf became aware of other assets which were not indicated in said first accounting. He learned that the American Home Products stock had been sold for $53,366.91. He did not learn this from the petitioner. He learned it from the transfer agent which informed Mr. Falgraf that Paine, Webber, Jackson and Curtis was the brokerage house handling the sale of said stock. By checking with Paine, Webber, Jackson and Curtis, Mr. Falsgraf learned of the brokerage account in the name of Frances B. Frohring.

He learned of the $38,000.00 that was turned over to the petitioner from the life insurance proceeds received by Mrs. Frohring as beneficiary of her deceased husband. He learned of the sale of the Newbury Hardware stock

which resulted in $8,000.00 in cash being turned over to the petitioner. He learned of the sale of Newbury Industries stock in the amount of $37,720.00, the sale of which was handled through the Cleveland Trust Company, the proceeds which were sent directly to the petitioner. Thus, by intensive searching, Mr. Falsgraf was able to discover that the petitioner, instead of having received approximately $65,000.00, had received over $137,000.00 of funds from the Roger L. Frohring Estate and from his widow, Frances B. Frohring.

So, Mr. Falsgraf then again approached the petitioner and confronted him with these facts and asked him to account for these other moneys which he had received. On September 23, 1963 (R. 92) (Exhibit 16), for the first time the petitioner revealed that Frances B. Frohring had an interest in Geauga Broadcasting Company in the form of $40,000.00 in stock. He maintains that the debentures were issued, but admits that the stock was never issued. Thus, the petitioner attempted to account for the approximately $137,000.00 that he now admitted he received by indicating the disbursements of $65,720.97, which constitutes State's Exhibit 4, and, in addition to that, $70,000.00 of which he alleged $40,000.00 was stock and $30,000.00 debentures in the Geauga Broadcasting Company. On or about November 23, 1963, a civil suit for damages was filed against the petitioner and others for the recovery of moneys misappropriated in the handling of the Estate of Roger L. Frohring and of the personal funds of Frances B. Frohring as an individual. On December 17, 1963, Mr. Falsgraf arranged to take the deposition of the petitioner. In the meantime, Mr. Falsgraf, since the second accounting of September 23, 1963, discovered that the petitioner had made a profit of $14,667.57 on the Paine-Webber account, and, during the taking of the deposition, confronted Mr.

Werner for the first time with this information. The petitioner stated that this sum was accounted for as follows: "to apply against future shares of Geauga Broadcasting Company." This so-called third accounting constitutes State's Exhibit 19. It should also be noted that in petitioner's second accounting (Ex. 16) he lists the proceeds of sale of American Home Products stock at $52,000.97, whereas in his third accounting (Ex. 19) he lists it at $53,368.01.

ARGUMENT.

Before taking up the questions presented for review by petitioner, the respondent will briefly go into the merits of the case. Petitioner cites *Cuyahoga River Power Co. v. The Northern Realty Co.*, 244 U. S. 300 (1917) as authority that the judgment of the Court of Appeals for Geauga County, Ohio, becomes the final judgment of the highest court of the State of Ohio. This case also provides:

> "Where grounds are broad enough to sustain the judgment irrespective of the merits of the Federal question involved in the defense, the Federal Supreme Court will not take jurisdiction of a writ of error to a state court."

This respondent contends that the following acts or failure to do acts, when taken together with the circumstances of the forged Paine-Webber checks, prove petitioner guilty beyond a reasonable doubt of embezzlement on eight separate counts.

a. The petitioner's failure to file in Probate Court any account within the five years he was attorney for the Estate of Roger L. Frohring.

b. The petitioner's failure to prepare and file a federal estate tax, although he knew that this was necessary, since

he had listed it as an exemption in preparing the application for determination of the State inheritance tax.

c. The petitioner's failure to file a timely application for determination of State inheritance tax and his further delay of two and one-half years to pay said tax, thus incurring interest payments.

d. The petitioner's failure to file an estate income tax return in any of said years.

e. Petitioner's failure to file income tax returns on behalf of Frances B. Frohring within said five-year period.

f. The petitioner's failure to file personal property tax returns on behalf of either the estate or on behalf of Frances B. Frohring.

g. The payment to petitioner of $10,000.00 as attorney's fees without an application nor approval for payment of attorney's fees by the Probate Court.

h. The petitioner's opening of a Paine-Webber account in the name of Frances B. Frohring in the approximate amount of $11,000.00 without her knowledge and the petitioner's failure to return to the Paine, Webber, Jackson and Curtis people the form which they required to be signed by Frances B. Frohring indicating her desire that all correspondence and checks be sent to the petitioner. Neither his secretary, Mrs. Marlene Smith, nor his partner, Ced L. Smith, knew of this Paine-Webber account.

i. The circumstances whereby Paine-Webber checks were sent directly to the petitioner in the total sum of over $90,000.00 which were made payable to Frances B. Frohring. The additional fact that each Paine-Webber check bore the forged endorsement of Frances B. Frohring, and bore the second endorsement of either the petitioner or his wholly controlled corporation; and that the petitioner admitted negotiating each of said checks. It should be

further noted that almost without exception each of the Paine-Webber checks were negotiated the day after they were written.

j. The petitioner's use of the proceeds of the checks, either for Geauga Broadcasting Company or for himself, with no authority from Frances B. Frohring having been given to him.

k. The lack of covering letters, notes or other writings to back up the petitioner's contention that Frances B. Frohring consented to his use of her funds in this manner.

l. The failure of the petitioner to issue stock or debentures to Frances B. Frohring and, further, his failure to produce letters, notes or other writings to back up his contention that over $86,000.00 of Frances Frohring's funds were used by Geauga Broadcasting Company.

m. The failure to register Geauga Broadcasting stock with the Securities Commission of Ohio.

n. The failure to register with the Federal Communications Commission the alleged interest of Frances B. Frohring in Geauga Broadcasting Company.

o. The petitioner's withdrawal of $10,000.00 of Frances B. Frohring's funds from the Security Federal Savings and Loan Association trust account and the use of said funds to buy stock in The Geauga County National Bank in the petitioner's name.

p. The complete lack of any note or other corroboration that this withdrawal of $10,000.00 of funds which petitioner was holding in trust for Frances B. Frohring was done on a loan basis with the consent of Frances B. Frohring.

q. The complete lack of cooperation and evasiveness in petitioner's dealings with William Falsgraf when Mr.

Falsgraf took over as attorney for the guardian of Frances B. Frohring in April of 1963 and thereafter.

r. The manner in which the petitioner responded to the demand of Mr. Falsgraf and his client, Jean Sargent, guardian of Frances B. Frohring, and Frances B. Frohring, for the petitioner to turn over all of the documents, tax returns, check books and other records which the petitioner had in his possession and which pertained to the administration of the Estate of Roger Frohring, and also the demand for the petitioner to turn over to Mr. Falsgraf any stock certificates, savings or check books or other records which the petitioner might have in his possession pertaining to the personal affairs of Frances B. Frohring.

s. The lack of knowledge of the petitioner's secretary, Marlene Smith, or his partner, Cedric L. Smith, who was also an officer of Geauga Broadcasting Company, and of the Treasurer of Geauga Broadcasting Company, Fred Austin, that Frances B. Frohring had any interest in Geauga Broadcasting Company or that she had loaned any money to Geauga Broadcasting Company or that she had allegedly authorized the petitioner to invest any of her funds in Geauga Broadcasting Company.

We turn now to the questions presented for review by the petitioners.

1. Was petitioner's constitutional right against self-incrimination violated when his testimony, books and records, taken pursuant to a deposition in a civil suit, were presented to a grand jury at a later date against his will and without his permission?

First, there is nothing in the record indicating that such presentment was made against petitioner's will. In fact the grand jury returned a secret indictment and the petitioner had no prior knowledge of such presentment.

Second, there is nothing in the record indicating that the contents of petitioner's deposition was of an incriminating nature. At no time has petitioner specified that any portion of said deposition incriminated or tended to incriminate him. Petitioner is an attorney and was an attorney when the deposition was taken in the civil matter. He had the knowledge and the right to exercise his constitutional right against self-incrimination during the taking of said deposition. The fact that he did not so exercise said right would indicate one of two things—that he waived the right or that no incriminating matters are contained therein.

Third, the deposition was not used in the trial before three judges and yet the petitioner was found guilty beyond a reasonable doubt. The conclusion to be drawn from this is that there was ample other evidence presented to the grand jury to justify its findings of probable cause for an indictment if there was sufficient other evidence to prove guilt beyond a reasonable doubt.

The opinion of the Court of Appeals of Geauga County, Ohio, answers this question for review and the other two questions presented far better than can this briefer. Said opinion is set forth in petitioner's Appendix A.

2. Was the petitioner denied due process when his attorney was prohibited from inquiring into the extent of the use of the deposition, books and records, attendant thereto before the grand jury and further prohibited from inquiry into testimony elicited before the grand jury of a mentally incompetent witness who had not been examined by the trial court as to competency prior to such testimony?

Petitioner's plea in abatement (Appendix I) states that his deposition was presented to the grand jury and

that the testimony of an alleged incompetent person was heard by the grand jury. This statement was not contested and therefore inquiry into the extent of the use of the deposition and the testimony was not germane.

Petitioner cites *Denis v. United States*, 16 L. Ed. 2d 973, to back his contention that he should have been permitted to examine the grand jury record. But in the *Denis* case examination was found to be necessary for the purpose of impeachment of the prosecution witnesses. This was not the purpose in the instant case and as has already been stated nothing was to be gained because the fact of the use of the deposition and the testimony of an alleged incompetent was not in dispute. *Pittsburgh Plate Glass Co. v. United States*, 360 U. S. 395, 400; 3 L. Ed. 2d 1323, 1327; 79 S. Ct. 1237, cited by petitioner provides in part that "any disclosure of grand jury minutes is covered by Rule 6(e) of the Federal Rules of Criminal Procedure, which is declaratory of the pre-existing rule that disclosure is committed to the discretion of the trial judge." The question should then be—did the trial judge abuse this discretion? The answer must be—no.

See also *Schmidt v. United States*, 115 F. 2d 394, Syll. 4, which states:

> "The responsibility for relaxing the rule of secrecy of grand jurors' deliberations and supervising any subsequent injury concerning them resides in the court of which the grand jury is part, and such matter appeals to the court's discretion when brought to its attention."

The alleged mentally incompetent witness was not adjudged incompetent, contrary to petitioner's allegation. A guardian had been appointed for her prior to her testifying before the grand jury and she remained under guardianship when she testified before the three-judge trial court.

Her status had not changed in the interim. The trial court found her capable of taking the stand and her testimony was not stricken.

In 97 *C. J. S.* (Witnesses) Sec. 119 it is stated:

> "The determination of the question of the competency of a witness is largely or almost wholly in the exercise of the discretion of the court."

3. Was the petitioner denied due process in violation of his constitutional rights by the refusal of the trial court to grant his motion to quash the indictment or to compel an election thereunder because of the improper joinder creating a multiplicity and duplicity of counts?

This is not a question which should invoke the jurisdiction of the Federal Supreme Court. The Court of Appeals considered and rejected this question and the State Supreme Court refused to hear it. This is the reason petitioner found no Federal Supreme Court cases on this question.

There is no inconsistency, multiplicity or duplicity here. Petitioner got possession of the Paine Webber checks in the course of his employment as attorney for the payee of the checks. It was after he obtained legal possession of the checks that the endorsements were forged and the checks were uttered. A check is a thing of value which may be the subject of embezzlement. If the acts done in the process of converting said checks to petitioner's use was the act of forgery and the act of uttering the forged checks, they are all separate acts, separate criminal intents and not inconsistent with each other.

Petitioner's citation of *Sheppard v. Maxwell*, 16 L. Ed. 2d 600, 86 S. Ct. 490, is entirely irrelevant to this case. There is nothing in the record indicating this case was

sensational. It was petitioner's choice to have a three-judge court rather than a jury hear his case.

It is respectfully submitted that petitioner's petition for writ of certiorari be denied.

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